

(3) The Employee Income Security Act of 1974 (Pub. L. 93-406, 88 Stat. 829), which causes such plan to fail to satisfy the requirements of section 401(a), 403(a), or 405(a).

(c) *Remedial amendment period.* (1) The remedial amendment period with respect to a disqualifying provision begins on the effective date of the disqualifying provision. For purposes of this section, the effective date of a disqualifying provision is—

(i) In the case of a disqualifying provision in a plan as adopted, the date the plan is put into effect,

(ii) In the case of a plan amendment, the date the plan amendment is adopted or put into effect (whichever is earlier), or

(iii) In the case of a statutory provision described in paragraph (b)(3) of this section, the effective date of such provision.

(2) Unless extended as provided by paragraph (d) of this section, the remedial amendment period ends with the time prescribed by law (including extensions) for filing the return of the employer for the employer's taxable year in which falls—

(i) With respect to a disqualifying provision in a plan as adopted, or a plan amendment, the later of the date on which such provision was adopted or put into effect.

(ii) With respect to a statutory provision described in paragraph (b)(3) of this section, the effective date of such provision.

(d) *Extension for determination letters—*

(1) *In general.* If, before the end of the remedial amendment period (determined without regard to this paragraph) with respect to a disqualifying provision, the employer or plan administrator files a request pursuant to § 601.210(o) of this chapter (Statement of Procedural Rules) for a determination letter with respect to the initial qualifications of the plan or the effect of such disqualifying provision on the qualified status of the plan (or a trust which is part of a plan) under section 401(a), 403(a), or 405(a), then except as provided in subparagraph (3) of this paragraph, such remedial amendment period may be extended for a period not to exceed 150 days, beginning on the day after the last day of the employers

taxable year in which falls the dates described in subdivisions (i) and (ii) of paragraph (c)(2) of this section. The 150-day period does not include any day on which there is pending before the Internal Revenue Service a request for a determination letter described in this subparagraph. For this purpose, such a request is considered to be pending before the Internal Revenue Service from the date it is filed with the Internal Revenue Service to the date on which notice of the final determination with respect to the request is issued by the Internal Revenue Service, the request is withdrawn, or the request is otherwise finally disposed of by the Internal Revenue Service.

(2) *Special rules.* Except as provided in subparagraph (3) of this paragraph, the period provided by subparagraph (1) of this paragraph shall not end prior to the later of December 31, 1975, or the expiration of 30 days after—

(i) The date on which a notice of final determination with respect to a request described in that subparagraph is issued by the Internal Revenue Service, or, where applicable,

(ii) The date on which a judgment pursuant to section 7476 (relating to declaratory judgments) by the United States Tax Court in a case or controversy involving such determination becomes final.

(3) *Overall limitation.* The period provided by subparagraph (1) of this paragraph shall not expire later than the last day (determined under section 6501) for assessment of any tax imposed by the Internal Revenue Code with respect to the taxable year of the employer immediately preceding the first day of such period.

(Sec. 401(b), Internal Revenue Code of 1954, 88 Stat. 943 (26 U.S.C. 401(b)))

[T.D. 7377, 40 FR 44544, Sept. 29, 1975]

§ 11.401(d)(1)-1 Nonbank trustees of trusts benefiting owner-employees.

(a) *Effective dates—*(1) *General rule.* For a plan not in existence on January 1, 1974, this section shall apply to the first plan year commencing after September 2, 1974, and all subsequent plan years.

(2) *Existing plans.* For a plan in existence on January 1, 1974, this section

shall apply to the first plan year commencing after December 31, 1975, and all subsequent plan years.

(b) *In general.* For plan years to which this section applies, the trustee of a trust described in § 1.401-12(c)(1)(i) may (notwithstanding § 1.401-12(c)) be a person other than a bank (within the meaning of section 401(d)(1)) if he demonstrates to the satisfaction of the Commissioner that the manner in which he will administer trusts will be consistent with the requirements of section 401. Such demonstration must be made by a written application to the Commissioner of Internal Revenue, Attention: E:EP, Internal Revenue Service, Washington, DC 20224. Such application must meet the requirements set forth in paragraphs (c) to (g) of this section.

(c) *Fiduciary ability.* The applicant must demonstrate in detail his ability to act within the accepted rules of fiduciary conduct. Such demonstration must include the following elements of proof:

(1) *Continuity.* (i) The applicant must assure the uninterrupted performance of its fiduciary duties notwithstanding the death or change of its owners. Thus, for example, there must be sufficient diversity in the ownership of the applicant to ensure that the death or change of its owners will not interrupt the conduct of its business. Therefore, the applicant cannot be an individual.

(ii) Sufficient diversity in the ownership of an incorporated applicant means that individuals each of whom owns more than 20 percent of the voting stock in the applicant own, in the aggregate, no more than 50 percent of such stock.

(iii) Sufficient diversity in the ownership of an applicant which is a partnership means that—

(A) Individuals each of whom owns more than 20 percent of the profits interest in the partnership own, in the aggregate, no more than 50 percent of such profits interest, and

(B) Individuals each of whom owns more than 20 percent of the capital interest in the partnership own, in the aggregate, no more than 50 percent of such capital interest.

(iv) For purposes of this subparagraph, the ownership of stock and of

capital and profits interests shall be determined in accordance with the rules for constructive ownership of stock provided in section 1563(e) and (f)(2). For this purpose, the rules for constructive ownership of stock provided in section 1563(e) and (f)(2). For this purpose, the rules for constructive ownership of stock provided in section 1563(e) and (f)(2) shall apply to a capital or profits interest in a partnership as if it were a stock interest.

(2) *Established location.* The applicant must have an established place of business in the United States where he is accessible during every business day.

(3) *Fiduciary experience.* The applicant must have fiduciary experience or expertise sufficient to ensure that he will be able to perform his fiduciary duties. Evidence of fiduciary experience must include proof that a significant part of the business of the applicant consists of exercising fiduciary powers similar to those he will exercise if his application is approved. Evidence of fiduciary expertise must include proof that the applicant employs personnel experienced in the administration of fiduciary powers similar to those he will exercise if his application is approved.

(4) *Fiduciary responsibility.* The applicant must assure compliance with the rules of fiduciary conduct set out in paragraph (f) of this section.

(5) *Financial responsibility.* The applicant must exhibit a high degree of solvency commensurate with the obligations imposed by this section. Among the factors to be taken into account are the applicant's net worth, his liquidity, and his ability to pay his debts as they come due.

(d) *Capacity to account.* The applicant must demonstrate in detail his experience and competence with respect to accounting for the interests of a large number of individuals (including calculating and allocating income earned and paying out distributions to payees). Examples of accounting for the interests of a large number of individuals include accounting for the interests of a large number of shareholders in a regulated investment company and accounting for the interests of a large number of variable annuity contract holders.

(e) *Fitness to handle funds*—(1) *In general.* The applicant must demonstrate in detail his experience and competence with respect to other activities normally associated with the handling of retirement funds.

(2) *Examples.* Examples of activities normally associated with the handling of retirement funds include:

- (i) To receive, issue receipts for, and safely keep securities;
- (ii) To collect income;
- (iii) To execute such ownership certificates, to keep such records, make such returns, and render such statements as are required for Federal tax purposes;
- (iv) To give proper notification regarding all collections;
- (v) To collect matured or called principal and properly report all such collections;
- (vi) To exchange temporary for definitive securities;
- (vii) To give proper notification of calls, subscription rights, defaults in principal or interest, and the formation of protective committees;
- (viii) To buy, sell, receive, or deliver securities on specific directions.

(f) *Rules of fiduciary conduct*—(1) *Administration of fiduciary powers.* The applicant must demonstrate that under applicable regulatory requirements, corporate or other governing instruments, or its established operating procedures:

(i)(A) The owners or directors of the applicant will be responsible for the proper exercise of fiduciary powers by the applicant. Thus, all matters pertinent thereto, including the determination of policies, the investment and disposition of property held in a fiduciary capacity, and the direction and review of the actions of all employees utilized by the applicant in the exercise of his fiduciary powers, will be the responsibility of the owners or directors. In discharging this responsibility, the owners or directors may assign to designated employees, by action duly recorded, the administration of such of the applicant's fiduciary powers as may be proper to assign.

(B) A written record will be made of the acceptance and of the relinquishment or closing out of all fiduciary ac-

counts, and of the assets held for each account.

(C) At least once during each period of 12 months all the assets held in or for each fiduciary account where the applicant has investment responsibilities will be reviewed to determine the advisability of retaining or disposing of such assets.

(ii) All employees taking part in the performance of the applicant's fiduciary duties will be adequately bonded. Nothing in this subdivision shall require any person to be bonded in contravention of section 412(d) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1112(d)).

(iii) The applicant will designate, employ, or retain legal counsel who will be readily available to pass upon fiduciary matters and to advise the applicant.

(iv) In order to segregate the performance of his fiduciary duties from other business activities, the applicant will maintain a separate trust division under the immediate supervision of an individual designated for that purpose. The trust division may utilize the personnel and facilities of other divisions of the applicant, and other divisions of the applicant may utilize the personnel and facilities of the trust division, as long as the separate identity of the trust division is preserved.

(2) *Adequacy of net worth.* (i) Not less frequently than once during each calendar year the applicant will determine the value of the assets held by him in trust. Such assets will be valued at their current value, except that the assets of an employee benefit plan to which section 103(b)(3)(A) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1023(b)(3)(A)) applies will be considered to have the value stated in the most recent annual report of the plan.

(ii) No fiduciary account will be accepted by the applicant unless his net worth (determined as of the end of the most recent taxable year) exceeds the greater of—

(A) \$100,000, or

(B) Four percent of the value of all of the assets held by the applicant in trust (determined as of the most recent valuation date).

(iii) The applicant will take whatever lawful steps are necessary (including the relinquishment of fiduciary accounts) to ensure that his net worth (determined as of the close of each taxable year) exceeds the greater of—

(A) \$50,000, or

(B) Two percent of the value of all of the assets held by the applicant in trust (determined as of the most recent valuation date).

(3) *Audits.* (i) The applicant will at least once during each period of 12 months cause detailed audits of the fiduciary books and records to be made by an independent qualified public accountant, and at such time will ascertain whether the fiduciary accounts have been administered in accordance with law, this section, and sound fiduciary principles. Such audits shall be conducted in accordance with generally accepted auditing standards, and shall involve such tests of the fiduciary books and records of the applicant as are considered necessary by the independent qualified public accountant.

(ii) In the case of an applicant who is regulated, supervised, and subject to periodic examination by a State or Federal agency, such applicant may adopt an adequate continuous audit system in lieu of the periodic audits required by paragraph (f)(3)(i) of this section.

(iii) A report of the audits and examinations required under this subparagraph, together with the action taken thereon, will be noted in the fiduciary records of the applicant.

(4) *Funds awaiting investment or distribution.* Funds held in a fiduciary capacity by the applicant awaiting investment or distribution will not be held uninvested or undistributed any longer than is reasonable for the proper management of the account.

(5) *Custody of investments.* (i) Except for investments pooled in a common investment fund in accordance with the provisions of paragraph (f)(6) of this section, the investments of each account will not be commingled with any other property.

(ii) Fiduciary assets requiring safekeeping will be deposited in an adequate vault. A permanent record will be kept of fiduciary assets deposited in or withdrawn from the vault.

(6) *Common investment funds.* Where not in contravention of local law the assets of an account may be pooled in a common investment fund (as defined in paragraph (f)(8)(iii) of this section) which must be administered as follows:

(i) Each common investment fund must be established and maintained in accordance with a written agreement, containing appropriate provisions as to the manner in which the fund is to be operated, including provisions relating to the investment powers and a general statement of the investment policy of the applicant with respect to the fund; the allocation of income, profits and losses; the terms and conditions governing the admission or withdrawal of participations in the fund; the auditing of accounts of the applicant with respect to the fund; the basis and method of valuing assets in the fund, setting forth specific criteria for each type of asset; the minimum frequency for valuation of assets of the fund; the period following each such valuation date during which the valuation may be made (which period in usual circumstances may not exceed 10 business days); the basis upon which the fund may be terminated; and such other matters as may be necessary to define clearly the rights of participants in the fund. A copy of the agreement must be available at the principal office of the applicant for inspection during all business hours, and upon request a copy of the agreement must be furnished to any interested person.

(ii) All participations in the common investment fund must be on the basis of a proportionate interest in all of the assets.

(iii) Not less frequently than once during each period of 3 months applicant must determine the value of the assets in the fund as of the date set for the valuation of assets. No participation may be admitted to or withdrawn from the fund except (A) on the basis of such valuation and (B) as of such valuation date. No participation may be admitted to or withdrawn from the fund unless a written request for or notice of intention of taking such action has been entered on or before the valuation date in the fiduciary records of the applicant. No request or notice may be

canceled or countermanded after the valuation date.

(iv)(A) The applicant must at least once during each period of 12 months cause an adequate audit to be made of the common investment fund by a qualified public accountant.

(B) The applicant must at least once during each period of 12 months prepare a financial report of the fund which, based upon the above audit, must contain a list of investments in the fund showing the cost and current market value of each investment; a statement for the period since the previous report showing purchases, with cost; sales, with profit or loss and any other investment changes; income and disbursements; and an appropriate notation as to any investments in default.

(C) The applicant must transmit and certify the accuracy of the financial report to the administrator of each plan participating in the common investment fund within 120 days after the end of the plan year.

(v) When participations are withdrawn from a common investment fund, distributions may be made in cash or ratably in kind, or partly in cash and partly in kind, provided that all distributions as of any one valuation date must be made on the same basis.

(vi) If for any reason an investment is withdrawn in kind from a common investment fund for the benefit of all participants in the fund at the time of such withdrawal and such investment is not distributed ratably in kind, it must be segregated and administered or realized upon for the benefit ratably of all participants in the common investment fund at the time of withdrawal.

(7) *Books and records.* (i) The applicant must keep his fiduciary records separate and distinct from other records. All fiduciary records must be so kept and retained for as long as the contents thereof may become material in the administration of any internal revenue law. The fiduciary records must contain full information relative to each account.

(ii) The applicant must keep an adequate record of all pending litigation

to which he is a party in connection with the exercise of fiduciary powers.

(8) *Definitions.* For purposes of this paragraph and paragraph (c)(5) of this section—

(i) The term “account” or “fiduciary account” means a trust described in section 401(a) (including a custodial account described in section 401(f)), a custodial account described in section 403(b)(7), or an individual retirement account described in section 408(a) (including a custodial account described in section 408(h)).

(ii) The term “administrator” means an administrator as defined in section 3(16)(A) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002(16)(A).

(iii) The term “common investment fund” means a trust which satisfied the following requirements:

(A) The trust consists of all or part of the assets of several accounts which have been established with the applicant, and

(B) The trust is described in section 401(a) and exempt from tax under section 501(a), or is a common investment fund described in § 1.408-2(b)(5) (as published with notice of proposed rule-making in the FEDERAL REGISTER on February 21, 1975, at 40 FR 7661), or both.

(iv) The term “employee benefit plan” means an employee benefit plan as defined in section 3(2) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002(2).

(v) The term “fiduciary records” means all matters which are written, transcribed, recorded, received or otherwise come into the possession of the applicant and are necessary to preserve information concerning the acts and events relevant to the fiduciary activities of the applicant.

(vi) The term “qualified public accountant” means a qualified public accountant as defined in section 103(a)(3)(D) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1023(a)(3)(D).

(vii) The term “net worth” means the amount of the applicant’s assets less the amount of his liabilities, as determined in accordance with generally accepted accounting principles.

(g) *Special rules*—(1) *Passive trustee*. (i) An applicant who undertakes to act only as a passive trustee may be relieved of one or more of the requirements of this section upon clear and convincing proof that such requirements are not germane, under all the facts and circumstances, to the manner in which he will administer any trust. A trustee is a passive trustee only if under the written trust instrument he has no discretion to direct the investment of the trust funds or any other aspect of the business administration of the trust, but is merely authorized to acquire and hold particular investments specified by the trust instrument. Thus, for example, in the case of an applicant who undertakes merely to acquire and hold the stock of a single regulated investment company, the requirements of paragraphs (f)(1)(i)(C), (1)(iv), and (6) of this section shall not apply and no negative inference shall be drawn from the applicant's failure to demonstrate his experience or competence with respect to the activities described in paragraph (e)(2)(v) to (viii) of this section.

(ii) The determination letter issued to an applicant who is approved by reason of this subparagraph shall state that the applicant is authorized to act only as a passive trustee.

(2) *Federal or State regulation*. Evidence that an applicant is subject to Federal or State regulation with respect to one or more relevant factors shall be given weight in proportion to the extent that such regulatory standards are consonant with the requirements of section 401.

(3) *Savings account*. (i) An applicant will be approved to act as trustee under this subparagraph if the following requirements are satisfied:

(A) The applicant is a credit union, industrial loan company, savings and loan association, or other financial institution designated by the Commissioner;

(B) The investment of the trust assets will be solely in deposits in the applicant;

(C) Deposits in the applicant are insured (up to the dollar limit prescribed by applicable law) by an agency or instrumentality of the United States or a State.

(ii) Any applicant who satisfies the requirements of this subparagraph is hereby approved, and (notwithstanding paragraph (b) of this section) is not required to submit a written application. This approval takes effect on the first day after December 22, 1976, on which the applicant satisfies the requirements of this subparagraph, and continues in effect for so long as the applicant continues to satisfy those requirements.

(4) *Notification of Commissioner*. The applicant must notify the Commissioner in writing of any change which affects the continuing accuracy of any representation made in the application required by this section, whether the change occurs before or after the applicant receives a determination letter. Such notification must be addressed to Commissioner of Internal Revenue, Attention: E:EP, Internal Revenue Service, Washington, DC 20224.

(5) *Substitution of trustee*. No applicant shall be approved unless he undertakes to act as trustee only under trust instruments which contain a provision to the effect that the employer is to substitute another trustee upon notification by the Commissioner that such substitution is required because the applicant has failed to comply with the requirements of this section or is not keeping such records, or making such returns, or rendering such statements as are required by forms or regulations.

(6) *Revocation*. Approval of the application required by this section may be revoked for any good and sufficient reason.

(Sec. 401(d)(1) and Internal Revenue Code of 1954 (88 Stat. 939 26 U.S.C. 401))

[T.D. 7383, 40 FR 48509, Oct. 16, 1975 as amended by T.D. 7448, 41 FR 55510, Dec. 21, 1976]

§ 11.402(e)(4)(A)-1 Lump sum distributions in the case of an employee who has separated from service.

(a) *Balance to the credit of an employee*. Section 402(e)(4)(A) provides that in order for a distribution or payment from a qualified plan to be a lump sum distribution, the distribution or payment must represent the employee's balance under the plan. The employee's balance does not include any amount which is forfeited under the plan (even though the amount may